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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE AIR CRASH DISASTER AT MALAGA, SPAIN,
ON SEPTEMBER 13, 1982

MDL-530

This Document Relates To:

MARIA DE LA LASTRA PETRIRE, Individually as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of Carlos Lazcano Conrado, deceased; MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of Carlos Lazcano Conrado, deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether this Court should define the jurisdictional limits of the treaty governing international air transportation; specifically, in the context of the petitioner's case, was it error for the court below to affirm the order of the district court dismissing petitioner's wrongful death action against respondent air carrier for lack of treaty (subject matter) jurisdiction under Article 28(1) of the Warsaw Convention notwithstanding the fact that petitioner's decedent sustained fatal injury while enroute to the United States and while travelling aboard respondent's aircraft pursuant to a ticket listing New York as his "place of destination"?

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OCTOBER TERM, 1984

IN RE AIR CRASH DISASTER AT MALAGA, SPAIN,
ON SEPTEMBER 13, 1982

MDL-530

No. ____

This Document Relates To:

MARIA DE LA LASTRA PETRIRE, Individually as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of Carlos Lazcano Conrado, deceased; MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of Carlos Lazcano Conrado, deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The Opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix to this Petition (App. 1a-7a) and is reported at 756 F.2d 263 (2d Cir. 1985). The opinion of the United States District Court for the Eastern District of New York also appears in the Appendix (App. 8a-11a) and is reported at 577 F.Supp 1013 (E.D.N.Y. 1984).

Jurisdiction

The petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on April 8, 1985. (App. 12a-13a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1985).

Treaty Involved

The provision of the Warsaw Convention[1] involved is Article 28. It provides:

> (1) An action for damages must be brought at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principal place of business or where he has a place of business through which the contract has been made, or before the court at the place of destination.

49 Stat. 3020.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 reprinted in 49 U.S.C. § 1502 note (1976) [Warsaw Convention].

Statement of the Case

Petitioner Maria De La Lastra Petrire is a citizen and domiciliary of Spain as was her late husband, Carlos Lazcano Conrado.

Respondent Spantax, S.A., the holder of a foreign air carrier permit issued by the Civil Aeronautics Board (CAB), is a privately owned Spanish corporation that is authorized to engage in charter operations between Spain and the United States.

The action for the death of petitioner's husband is one of over 200 passenger personal injury and/or death actions commenced in the United States against defendant respondent Spantax, S.A. as a result of the crash of respondent's DC-10 aircraft at Malaga, Spain on September 13, 1982 during a planned flight from Madrid to New York.

Pursuant to the provisions of 28 U.S.C. 1407, Petitioner's action was consolidated with other actions arising out of the Malaga disaster by order of the Judicial Panel on Multidistrict Litigation and assigned to Hon. Eugene H. Nickerson of the United States District Court for the Eastern District of New York, *In Re Air Crash Disaster at Malaga, Spain on September 13, 1982* (MDL Docket No. 530).

In the wake of *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980* (2d Cir. 1983), 705 F.2d 85, *cert. denied* (1983) 464 U.S. ____, 104 S.Ct. 147, 78 L.Ed.2d 138 (imposing absolute unlimited liability on a defendant air carrier that failed to comply with the ticket format requirements of the Montreal Agreement),[2] respondent Spantax, S.A. agreed not to contest liability while reserving the right to move on jurisdictional grounds against several complaints filed in the United States, including that filed on behalf of Petitioner herein.

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2 Agreement CAB 18900, approved by CAB Order E-23680, 31 Fed. Reg. 7302 (1966).

The jurisdictional facts bearing on respondent's Rule 12 motion to dismiss Petitioner's complaint were contained in an affidavit by a Spantax ticket agent which, in sum, said: Two consecutively numbered tickets were issued simultaneously but separately for the benefit of petitioner's husband in two distinct ticket booklets; one ticket covering the flight from Madrid to New York on September 13, 1982 and the second ticket for the planned return flight five days later. The tickets were issued at the direction of respondent carrier's president with whom decedent apparently dealt. Having no personal knowledge of the ticket transaction, petitioner conceded that her husband's intended stay in the United States was temporary and that the ticket arrangements made for his travel to the United States occurred in Spain, the *locus* of respondent's domicile, corporate headquarters and operations base. Under these circumstances, and notwithstanding expert evidence to the contrary,[3] the district court concluded that decedent's separate tickets comprised a single contract of carriage involving a round trip journey with Spain as the intended destination.[4]

Accordingly, under the authority of *Smith v. Canadian Pacific Airways, Ltd.* (2d Cir. 1971), 452 F.2d 798 and *Gayda v. LOT Polish Airlines* (2d Cir. 1983), 702 F.2d 424, the complaint was dismissed for lack of treaty (subject matter) jurisdiction as mandated by Article 28(1) of the Warsaw Convention in that the United States, *inter alia*, was not "the

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3 Petitioner's attorneys submitted an opinion affidavit by a domestic airline official, to which pertinent portions of the International Air Transport Association (IATA) Ticketing Handbook were attached, for the purpose of establishing that under industry custom and practice two one-way tickets constitute two separate contracts of carriage.

4 In the evidentiary sense, considering (1) the requirements of FRCP 56, let alone FRCP 12, (2) the fact that the action was one for wrongful death in which the air carrier had exclusive possession of the facts, (3) the impact of New York's "dead man's statute", CPLR 4519, (4) the self serving double hearsay nature of the supporting affidavit, (5) defendant's burden of proof, *Manion v. Pan American World Airways, Inc.* (1982), 55 N.Y.2d 398, 449 N.Y.S.2d 693, and (6) industry practice, it is believed an intent to enter separate contracts should have been presumed.

place of destination". The Court of Appeals affirmed, citing with approval *Butz v. British Airways* (E.D. Pa. 1976), 421 F.Supp. 127, *aff'd without opin.* (3d Cir. 1977), 566 F.2d 1168.

Reasons for Granting the Writ

The Warsaw Convention was drafted at the dawn of the air age to achieve uniform treatment of passengers travelling in international air transportation, *Trans World Airlines, Inc. v. Franklin Mint Corp., et al* (1984), 462 U.S. 1118; 104 S.Ct. ____, 80 L.Ed.2d 273, unoff. Rptd. 18 Avi CCH 17,778. Yet, in the ensuing years, provisions of the treaty have been interpreted often with incongruous result and sometimes in a way that is in conflict with the notion of uniformity. See, Lowenfeld *Aviation Law*, 2d Ed. (1981), M. Bender, New York § 2.5 pp. 7-49 to 53 and compare *Noel v. Linea Aeropostal Venezolana* (2d Cir. 1957), 247 F.2d 677, *cert. denied*, 355 U.S. 907 to *Benjamins v. British European Airways* (2d Cir. 1978), 572 F.2d 913, *cert. denied*, 439 U.S. 1114 (1979).

One of the more peculiar, if nc. inexplicable interpretations, is that which treats a passenger's departure as his destination for the purposes of Article 28(1), usually with the effect of depriving a litigant of an American venue, *Butz v. British Airways*, *supra*; *Galli v. RE-AL Brazilian International Airlines* (Sup. Queens 1961), 29 Misc.2d 499, 211 N.Y.S.2d 208. Such incongruity is exemplified by the dismissal of petitioner's complaint, *Petrire v. Spantax* (2d Cir. 1985), 756 F.2d 263.

In the interest of achieving rational uniformity in passenger treatment, petitioner respectfully requests that the treaty provision prescribing national venue be examined by this Court in the light of modern times and the original intent of those who drafted Article 28(1).

Petitioner contends that since the framers of the Warsaw Convention intended to establish a cause of action in favor of an injured passenger or his estate sounding in contract, Calkins, *The Cause of Action Under the Warsaw Convention*,

26 J. Air L. & Com. 217 (1959), the purpose of Article 28(l) was to assure that actions brought under the Warsaw Convention would come before the forums of the High Contracting Parties as opposed, in the words of the delegate from Great Britain, to those forums of ". . . far-off countries, where the courts really are not well organized", English text quoted by Prof. Lowenfeld, *Aviation Law*, *supra*, at p. 7-50, citing II Conference International de Droit Prive Aerien 4-12 October 1929 (Warsaw Proceedings), at 77-79; see also Calkins, *The Cause of Action Under the Warsaw Convention*, *supra*, at 229. Thus, with respect to transportation between two High Contracting Parties, petitioner respectfully submits that the intent of the framers was to give the plaintiff the option of bringing suit in the country where the transportation originated or in the country to which the passenger was journeying.

Petitioner's position finds support in the comment of the delegates who spoke in favor of the British proposal to eliminate the *situs* of the accident as one of the contractual forums. Mr. Ripert of France observed that ". . . when there is involved . . . a traveler who has entered into a contract and . . . has placed himself under the governing rules of the convention . . . , there is no reason at all for that person to go trying his case before any old court which happens, by chance, to be the court of the place of accident", Warsaw Proceedings, pp. 77-79, English text quoted by Calkins, *supra*, at 230. In his supporting statement, Mr. Pittard of Switzerland spoke of the contractual forums as "the court of the place of departure *or arrival*" (emphasis added), Calkins, *supra*.

The narrow hyper-technical and, it is submitted, illogical construction of Article 28(1) expressed in *Butz v. British European Airways*, *supra* and embodied in the opinions of the lower courts in this case, which treats the passenger's place of departure as his destination, originates with an English case decided nearly fifty years ago, *Grein v. Imperial Airways, Ltd.*, 1 K.B. 50 (1937); 55 L.I.L.R. 318; 106 L.J.R. 109 (Ct. of App. England 1936); unoff. Rptd. in 1 Avi CCH 622. In that case, the decedent passenger was killed in Belgium on a flight

between London and Antwerp. Since Belgium, at the time of the crash in 1933, was not one of the High Contracting Parties to the Convention, the lower court, in interpreting "international transportation" as defined in Article 1(2)[5] held the flight was not subject to the terms of the treaty. This because "the place of departure and the place of destination" were not "situated within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party." A divided Court of Appeal reversed the lower court upon the grounds the transportation, irrespective of the number or format of the passenger tickets, contemplated a round trip in which, for the purposes of Article 1, London was the passenger's place of destination as well as his place of departure. Although the *Grein* case was cited with approval by the panel, 756 F.2d 265, a different result was reached by the Supreme Court of British Columbia in 1961, *Stratton v. Trans-Canada Air Lines* (Brit. Col. Sup. Ct. 1961) 27 D.L.R.2d 670, unoff. Rptd., 7 Avi CCH 17,724, *app. dism.* (Brit. Col. Ct. App. 1962), 32 D.L.R.2d 736. There, the Canadian court held a separately ticketed domestic flight was excluded from the Convention's coverage notwithstanding the fact that reservations therefor were made by the passenger with the carrier when he changed his itinerary while still in the United States.

It is significant to note that the issue in the *Grein* and *Stratton* cases related to the applicability of the treaty under Article 1, an issue that is substantially different from the propriety of a forum for the purposes of Article 28.

When the Imperial Airlines disaster occurred nearly fifty-two years ago, only twenty-one nations adherred to the Warsaw Convention. Today, the vast majority of the nations of the world are High Contracting Parties, including most, if not all, of those that have emerged since decolonization after World War II. Well over one hundred, many once thought of in the words of the British delegate, as "far-off countries", are now signatories to the Treaty, *Aeronautical Statutes and Related*

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5 See Appendix for text of Article 1.

Material, Revised Dec. 31, 1974, compiled by the Office of the General Counsel of the Civil Aeronautics Board, pp. 509-512.

Under the circumstances of decedent Lazcano's transportation, involving a flight between two countries that have been High Contracting Parties to the treaty for over a half century, it makes little or no sense to exclude the United States as a contractual forum. This is particularly true when the decedent passenger died in a crash while enroute to the United States after being accepted by the carrier upon his surrender of a ticket coupon listing New York as his "place of destination". The surrender of the ticket coupon is significant because the contract of carriage was not consummated until decedent boarded respondent's aircraft and surrendered the ticket coupon pertinent to the transportation expressed thereon; *i.e.*, Madrid to New York via Malaga, *French Cour de Cassation*, 9.3.42 D.P. (1942) 2.62 R.G.D.A. 1946, p. 91, cited and quoted by H. Drion, *Limitations of Liabilities in International Air Law*, the Hague, M. Nighoff (1954), at pp. 283-284.

Since decedent's return flight from New York to Madrid was subject to a ticket separately issued in a separate ticket booklet, that portion of his transportation remained unconsummated whether subject to a single contract of carriage as found by the lower courts or to a separate contract as urged by petitioner. This because decedent, having no need to surrender it for the flight to New York, retained the separately issued booklet and ticket coupon expressing "Madrid" as his "place of destination".[6]

A more flexible interpretation of "destination", as used in Article 28(1), was expressed by J. Takasugi in *Hurley v. KLM Royal Dutch Airlines* (C.D. Cal. 1983), 562 F.Supp 260 (va-

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6 Although there is a separate ticket coupon for each leg of a passenger's journey, the entire itinerary is ordinarily contained on each ticket coupon, including the location designated "place of destination". The ticket coupon surrendered by petitioner's husband listed "New York" not "Madrid" as decedent's "place of destination."

cated 602 F.Supp. 1249 pursuant to a settlement agreement between the parties),[7] at page 261:

> "In the absence of controlling case law in the Ninth Circuit, this Court adopts a common sense interpretation and understanding of the term "destination". This court concludes that in the context of a round trip ticket, at least two places of destination exist . . ." [citing *Aanestad v. Air Canada, Inc.* (C.D. Calif. 1975 per J. Hall), 390 F.Supp 1165, 1168].

After acknowledging that the rule is different in the Second and Third Circuits, J. Takasugi observed at 261:

> ". . . [D]efendant has failed to present any evidence that the other contracting countries to the Warsaw Convention have adopted the 'ultimate destination' interpretation advanced by defendant. Finally, in light of the current marketing schemes utilized by airlines in promoting and selling round trip tickets, this court concludes that it would be unrealistic and impractical to adopt the mechanical and inflexible interpretation advanced by defendant".

It cannot be reasonably said that J. Takasugi's "common sense interpretation" of Article 28(1) is at logger heads with the letter or spirit of the Warsaw Convention. Indeed, since "a treaty, whether construed strictly or liberally, must be interpreted to effect its evident purpose", *Reed v. Wiser* (2d Cir. 1977), 555 F.2d 1079, 1088, *cert. denied*, 434 U.S. 922, it is respectfully submitted that J. Takasugi's interpretation of "destination" is the only interpretation that truly reflects the original intent of those who drafted the Warsaw Convention.

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7 The attorneys for Respondent Spantax, S.A. represented defendant KLM in the *Hurley* case as well as defendant air carriers in the *Butz* and *Gayda* cases. See Appendix for a copy of the Settlement Agreement vacating J. Takasugi's opinion order.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 26, 1985

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 247 — August Term, 1984

(Argued: October 18, 1984 Decided: February 28, 1985)

Docket No. 84-7540

MARIA DE LA LASTRA PETRIRE,
Plaintiff-Appellant,

v.

SPANTAX, S.A.,
Defendant-Appellee.

Before:

NEWMAN, CARDAMONE, and DAVIS,* *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing a suit against defendant for lack of subject matter jurisdiction. 577 F. Supp. 1013.

Affirmed.

Frank H. Granito, Jr., New York, N.Y. (Mark A. Pullano, Speiser & Krause, P.C., New York, N.Y., on the brief), for plaintiff-appellant.

* The Honorable Oscar H. Davis of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Michael J. Holland, New York, N.Y. (Condon & Forsyth, New York, N.Y., on the brief), for defendant-appellee.

JON O. NEWMAN, *Circuit Judge:*

This appeal presents a narrow issue arising under the Warsaw Convention:[1] Where one carrier issues two ticket booklets for a round-trip journey, is the "destination" for purposes of the Treaty's jurisdictional provision the designated ending point of the round-trip journey or the designated ending point of the fatal travel covered by the first booklet. Maria de la Lastra Petrire appeals from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing, for lack of subject matter jurisdiction, her suit against Spantax, S.A., a Spanish airline. *In re Air Crash Disaster at Malaga, Spain*, 577 F. Supp. 1013 (E.D.N.Y. 1984). Because we agree with Judge Nickerson that jurisdiction was lacking on the undisputed facts of this case, we affirm.

Appellant brought suit as the widow and mother of the minor children of Carlos Conrado, who was killed in the crash of a Spantax aircraft as it took off from Malaga, Spain, en route to New York. Conrado had contracted with Spantax for air travel from Madrid to New York on a flight that stopped at Malaga and for a return flight from New York to Madrid. He was ticketed to return to Madrid five days after his expected arrival in New York. The ticketing was accomplished at the

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[1] Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C.A. § 1502 note (1976).

Madrid office of Spantax by the simultaneous issuance of two ticket booklets, consecutively numbered. The first contained two flight coupons, one for the flight from Madrid to Malaga and the second for the flight from Malaga to New York. The second booklet contained a single flight coupon for the flight from New York to Madrid.[2]

Article 28(1) of the Warsaw Convention specifies the permissible jurisdiction in which suit may be brought:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court [1] of the domicile of the carrier or [2] of his principal place of business, or [3] where he has a place of business through which the contract has been made, or before the court [4] at the place of destination.

Appellant concedes that the first three locales specified in Article 28(1) would require her to bring suit in Spain. However, she asserts the right to sue in the United States[3] because New York was the destination listed on Conrado's Madrid-New York ticket.

Appellant does not dispute that, for purposes of the Warsaw Convention, the "destination" of a round-trip

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[2] Spantax submitted an affidavit of the ticketing clerk at Madrid, who stated that he used two booklets because (a) his supply that day did not include booklets with more than two ticket coupons and (b) he used up one booklet by issuing coupons for travel from Madrid to Malaga and from Malaga to New York. Whether or not this was his reason, which appellant disputes and we need not decide, the facts concerning the time and place of issuance of the two booklets and the dates of the intended travel are undisputed.

[3] Article 28 concerns jurisdiction on the "national level." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971).

journey is the same as the starting point—in this case, Spain. *Butz* v. *British Airways*, 421 F. Supp. 127, 130-31 (E.D. Pa. 1976), *aff'd mem.*, 566 F.2d 1168 (3d Cir. 1977); *Grein* v. *Imperial Airways, Ltd.*, [1936] 1 K.B. 50, 1 Av. Cas. (CCH) 622 (1936); *see* R. Mankiewicz, *The Liability Regime of the International Air Carrier* § 32, at 30 (1981). Her point, however, is that the "destination" of a journey must be determined from the terms of the ticketing contract and that in this case the ticket booklet for travel from Madrid to New York was the pertinent contract.

There is no doubt that a "destination" is to be determined from the contract for transportation, whether the destination is pertinent to national jurisdiction under Article 28, *Gayda* v. *LOT Polish Airlines*, 702 F.2d 424 (2d Cir. 1983), or to the international nature of a journey and the consequent application of the Treaty, *Grey* v. *American Airlines*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). What is less clear is determination of the pertinent contract and the pertinent transportation.

In the District Court, Judge Nickerson took the sensible approach of ruling that at least in this case where it was undisputed that two ticket booklets were issued sequentially at the same time and the same place for round-trip travel to be interrupted by no more than a five-day stopover, a single contract had been made. The already fine distinctions that have developed in construing the Warsaw Convention would become absurd if the existence of a single contract turned on whether the three coupons issued for travel in this case were enclosed in one or two booklets, or whether a second

booklet was used because the ticketing agent did not have on hand a ticket booklet with more than two coupons, or whether the two booklets were stapled together. What should matter when determining whether two or more ticket booklets constitute a single contract for purposes of the Treaty are the time and place of issuance of the booklets and the contemplated degree of continuity of the journey being ticketed. We need not attempt to formulate a general test to fit all of the combinations of relevant facts that might arise. It suffices to agree with Judge Nickerson that a single contract existed on the undisputed facts of this case. Appellant makes no claim that Conrado intended to purchase only a ticket from Madrid to New York and was issued a return ticket by mistake.

Determining the matter on the basis of when and where the booklets were issued and the nature of the journey contemplated accords with the scheme of the Treaty. Article 1(2) defines "international transportation" with reference to the place of departure and place of destination of any "transportation," and Article 1(3) elaborates on that term as follows:

> Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts . . . .

Plainly, when different carriers are involved, the pertinent unit of travel for determining the "destination" is the "single operation" of "undivided transportation" as "regarded by the parties," whether that transportation is

ticketed in one or a series of contracts. *See Pimentel* v. *Bland*, 748 F.2d 94, 96-97 (2d Cir. 1984).[4] When the transportation is to be performed by a single carrier, it would make little sense to use a different approach and let the number of contracts determine the "destination." In this case the undisputed facts show a "single operation" of "undivided transportation" as "regarded by the parties." The objective facts of the ticketing, which justified Judge Nickerson in concluding that only one contract existed, also support the conclusion that there was one "transportation" within the meaning of the Treaty. The destination of that transportation was Madrid.

Appellant contends that an air traveler should not be deprived of the option of purchasing "two one-way tickets for the purpose of assuring Article 28 jurisdiction in a desired national venue." Brief for Appellant at 15. She relies on language in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968), pointing out that a passenger must be given notice of the Treaty's limitations of liability so that he may have "the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit." *Id.*

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[4] Separate contracts with separate destinations were held to exist when a second booklet was purchased six weeks after the first booklet, at a different city, and for travel to a different destination than was contemplated when the first booklet was issued. *Stratton* v. *Trans Canada Air Lines*, 27 D.L.R.2d 670, 7 Av. Cas. (CCH) 17,724 (Brit. Col. Sup. Ct. 1961), *appeal dismissed*, 32 D.L.R.2d 736 (Brit. Col. Ct. App. 1962). On the other hand, a single contract was held to exist when six ticket booklets each containing four coupons were issued at one place and one time for a round-the-world journey with various stopovers. *Vergara* v. *Aeroflot "Soviet Airlines,"* 390 F. Supp. 1266 (D. Neb. 1975).

at 513. Even if we were to assume that a passenger might wish to select the number of ticket booklets for his journey in order to try to make available a forum in the country where the travel covered by one booklet is scheduled to terminate, such a maneuver is not the "self-protection" contemplated by *Lisi*.[5] An expressed preference for two ticket booklets cannot change the unitary nature of either the resulting contract or the transportation being ticketed. On the facts of this case, whether or not two ticket booklets were requested (and there is no claim that they were), there was only one contract and one transportation.

The judgment of the District Court is affirmed.

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[5] If an air traveler wishes to take steps in contemplation of the hazards of flying not only by purchasing insurance but also by assuring that suit may be brought in a particular country, he usually has the option of traveling on a carrier whose domicile or principal place of business is located in that country.

Opinion by the United States District Court Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

Jan. 30, 1984

In re AIR CRASH DISASTER AT MALAGA, SPAIN ON SEPTEMBER 13, 1982

This Order Relates to:

Lazcano, 83 C 1264, Araque 83 C 1486.

Nos. 83 C 1264, 83 C 1468. MDL 530.

Airline moved to dismiss complaints for lack of subject matter jurisdiction under Warsaw Convention, which all parties agree governed suit arising out of air crash. The District Court, Nickerson, J., held that place of destination, for purposes of determining jurisdiction, was Spain for passenger who purchased two tickets in single transaction for travel from Spain to New York and back to Spain, with a stop in New York for only a few days; however, for passenger who purchased ticket from Spain to New York, New York was place of destination.

Motion granted in part and denied in part.

Speiser & Krause, P.C., New York City (Frank H. Granito, Jr., New York City, of counsel), for Lazcano's heirs.

Mel Sachs, New York City, for plaintiff Araque.

Condon & Forsyth, New York City (Michael J. Holland, New York City, of counsel), for defendant Spantax, S.A.

MEMORANDUM AND ORDER

NICKERSON, *District Judge*.

Defendant Spantax, S.A. (Spantax) moves to dismiss the Lazcano and Araque complaints for lack of subject matter jurisdiction under Article 28 of the Warsaw Convention, which all parties agree governs.

Article 28(1) sets forth four places only where suit may be brought. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971). They are the domicile of the carrier, its principal place of business, its place of business through which the contract has been made, and the place of destination. Plaintiffs concede that Spantax's domicile and principal place of business and the places of contracting are in Spain. This dispute is over the definition of "place of destination."

Spantax claims that both Lazcano and Araque entered into contracts for carriage for travel from Spain to New York and back to Spain, and that, although the airplane crashed on its take-off for New York, the "ultimate destination" was Spain. Spantax has submitted copies of the tickets purchased showing Madrid, Spain to be the final destination.

Lazcano's heirs argue that Spantax issued to him not a round-trip ticket but two separate one-way tickets, one for the flight of Madrid to Malaga to New York, the other for New York to Madrid. He was traveling from Malaga to New York when the crash occurred. Plaintiffs also argue that the "planned destination" of the ill-fated flight is sufficient to give jurisdiction.

Spantax says that Lazcano received two tickets rather than a single round-trip ticket because its clerk had in his possession "passenger ticket and baggage checks . . . with only two passenger coupons," Pascual affidavit ¶ 4, an insufficient number for the series of flights. Plaintiffs object to any reliance on the affidavit calling its recital of a direction given Pascual by the president of Spantax hearsay, and its recounting of the transaction with the decedent incompetent under New York's Dead Man Statute, N.Y.Civ.Prac.Law § 4519.

Araque asserts that, regardless of what her ticket read, she purchased only a one-way ticket from Madrid to New York. Her affidavit states that she lives in New York, took a vacation in Spain from June to September, and had no intention of returning to Madrid. She paid approximately $200 for her return flight to New York, presumably the price of a one-way ticket.

The Second Circuit stated that "for Article 28 purposes it is the 'ultimate' destination listed in the contract for carriage that controls." *Gayda v. LOT Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983). In that case, the decedent's passenger ticket was for a Poland to New York to Poland trip, and plaintiffs conceded that Poland was the destination of the contract of carriage. In determining that the stop in New York was not significant, the Court of Appeals cited *Butz v. British Airways*, 421 F.Supp. 127 (E.D.Pa.1976), *aff'd without opinion*, 566 F.2d 1168 (3d Cir. 1977), which noted that the Article 28 "place of destination" in a trip consisting of several parts is the ultimate destination. *Id.* at 130. In that case, plaintiff had purchased a round-trip ticket, London to New York to London; the court held that, although he was injured as the airplane landed in New York, London was the place of destination.

Although the courts appear not to have addressed the issue, there is no reason why the simultaneous issuance of two separate tickets rather than one round-trip ticket should make a difference. As in the *Gayda* case, *supra*, New York was to be only a stopping point before Lazcano's clearly-intended return to Spain. Plaintiffs do not dispute that Lazcano bought the tickets at the same time and place. Indeed, they are consecutively numbered from Spantax stock. Nor do plaintiffs dispute that the contract for carriage was made in a single transaction for travel from Spain to New York and back to Spain, with the stop in New York for only a few days. As the Court of Appeals stated in the *Gayda* case, it is the ultimate destination listed in the contract for carriage that governs. The contract of carriage can consist of more than one piece of paper.

Pascual's explanation as to why he issued two tickets is plausible in light of the additional stopover in Malaga, but there is no need to consider whether the reasons he gave for the fact that he issued two rather than one are accurate.

Araque's situation is different. The facts she presented in her affidavit indicate that New York and not Spain was her intended ultimate destination. It is true that the ticket shows a trip of Madrid-New York-Madrid. However, she claims that she did not notice what the ticket read when she bought it and does not know why Madrid was inserted as the final leg. The court does not consider that the *Gayda* decision precludes either the passenger or the carrier from showing that certain terms in the purported contract of carriage arose from a mutual mistake.

Spantax's motion is granted as to the Lazcano complaint and denied as to the Araque complaint. So ordered.

Order Denying Reargument

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 84-7540

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of April one thousand nine hundred and eighty-five.

MARIA DE LA LASTRA PETRIRE, individually, as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of CARLOS LAZCANO CONRADO, Deceased, MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of CARLOS LAZCANO CONRADO, Deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Plaintiffs,

MARIA DE LA LASTRA PETRIRE,

Plaintiff-Appellant,

v.

SPANTAX, S.A.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Maria De La Lastra Petrire,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Stipulation and Order in Hurley v. KLM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 82-6258 RMT (Kx)

JUNE HURLEY,

Plaintiff,

vs.

KLM ROYAL DUTCH AIRLINES, and DOES I-XX, inclusive,

Defendants.

ORDER

IT IS HEREBY ORDERED that this Court's Order of April 11, 1983, reported as *Hurley v. KLM Royal Dutch Airlines*, 562 F. Supp. 260 (C.D. Cal. 1983), be vacated.

Dated: February 15, 1985

/s/ ROBERT M. TAKASUGI
Robert M. Takasugi
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 82-6258 RMT (Kx)

JUNE HURLEY,

Plaintiff,

vs.

KLM ROYAL DUTCH AIRLINES, and DOES I-XX, inclusive,

Defendants.

STIPULATION FOR DISMISSAL

PURSUANT TO RULE 41(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE:

IT IS HEREBY STIPULATED by and between the parties hereto through their respective counsel herein, that the above-entitled action be dismissed with prejudice, each party to bear its own costs.

IT IS FURTHER STIPULATED by and between the parties herein that the Order of the Court regarding defendant KLM Royal Dutch Airlines' Motion to Dismiss or in the Alternative for Summary Judgment, heard on March 28, 1983, decided on April 11, 1983, reported as *Hurley v. KLM Royal Dutch Airlines*, 562 F. Supp. 260 (C.D. Cal. 1983), be vacated.

Dated: February 12, 1985

CONDON & FORSYTH

By: /s/ ROD D. MARGO
Rod D. Margo
David A. Senior
Attorneys for Defendant
KLM ROYAL DUTCH AIRLINES

Dated: February 11, 1985

By: /s/ WILLIAM J. MCCRACKEN
William J. McCracken
Attorneys for Plaintiff
June Hurley

IT IS SO ORDERED.

Dated: February 15, 1985

/s/ ROBERT M. TAKASUGI
Robert M. Takasugi
United States District Judge

Warsaw Convention, Chapter I, Article I

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SPANTAX, S.A.

MICHAEL J. HOLLAND
Counsel for Respondent
Spantax, S.A.
1251 Avenue of the Americas
New York, New York 10020

BEST AVAILABLE COPY

12 pp

Question Presented

Did the Court below correctly determine that Spain was "the place of destination" of the contract of transportation made by petitioner's decedent so that the Courts of the United States lacked subject matter jurisdiction to hear the case under Article 28(1) of the Warsaw Convention?

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No. 85-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT SPANTAX, S.A.

Statement of the Case

This is an action to recover damages for the alleged wrongful death of Carlos Conrado Lazcano, petitioner's decedent, who was killed in the crash of a Spantax[1] aircraft at Malaga, Spain on September 13, 1982. Decedent, a Spanish citizen and resident, was a passenger on the aircraft pursuant to a passenger ticket comprised of two consecutively numbered ticket booklets for his round trip flight from Madrid to New York to Madrid. The two booklets were issued simultaneously in Madrid, Spain and provided for transportation from (1) Madrid to Malaga, (2)

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[1] Spantax, S.A. is a privately held Spanish corporation. It has no parent companies and holds some shares in Club de Vacaciones, a tour operator.

Malaga to New York, and (3) New York to Madrid. The Madrid to Malaga and Malaga to New York coupons were in the first numbered ticket booklet and the New York to Madrid coupon was in the second numbered ticket booklet. At the time of his death, petitioner's decedent was travelling on the Malaga to New York coupon in the first numbered ticket booklet.

Petitioner did not dispute that her decedent's travel was "international transportation" [2] within the meaning of the Warsaw Convention or that the only way of establishing subject matter jurisdiction in the United States was to demonstrate that New York was "the place of destination" in the contract of transportation of her decedent. She claimed, however, that the two ticket booklets should be interpreted to be two separate contracts of transportation and that jurisdiction was proper in the United States since New York was "the place of destination" within the meaning of Article 28(1)[3] of the Warsaw Convention because it was the destination in the coupon on which her decedent was travelling at the time of the accident.

Both the District Court and the Court of Appeals, following earlier precedents, held that there was but one contract of transportation and that "the place of destination" of the transportation, within the meaning of Article 28(1), was Madrid, Spain, the ultimate destination shown on the

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[2] Officially, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, reprinted in 49 U.S.C.A. §1502 note (1976). Hereinafter the treaty will be referred to as the Warsaw Convention or simply the Convention.

[3] Article 28(1) of the Warsaw Convention provides as follows:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

49 Stat. 3020.

flight coupons which made up the contract of transportation. In dismissing the Complaint, both the District Court and the Court of Appeals concluded that the courts of the United States lacked subject matter jurisdiction over the case in the "treaty sense" since the United States was not one of the four places where an action for damages must be brought under Article 28(1) of the Warsaw Convention. The District Court's dismissal of the Complaint for lack of treaty jurisdiction, 577 F. Supp. 1013 (E.D.N.Y. 1984) (App. 8a-11a), was affirmed by the Court of Appeals. 756 F.2d 263 (2d Cir. 1985) (App. 1a-7a). A petition for rehearing was denied by the Court of Appeals on April 8, 1985 (App. 12a-13a). This petition followed.

REASONS FOR DENYING THE WRIT

I.

No Significant Issue Is Presented for Review by the Certiorari Petition.

The narrow issue presented for review is whether the petitioner's decedent had one or two contracts of transportation with Spantax. If there was only one contract of transportation, then Madrid was indisputably "the place of destination" within the meaning of Article 28(1) of the Warsaw Convention. If each ticket booklet was a separate contract of transportation, then New York was "the place of destination". Analyzing the undisputed facts, the Court of Appeals concluded that there was but one contract of transportation.

> The already fine distinctions that have developed in construing the Warsaw Convention would become absurd if the existence of a single contract turned on whether the three coupons issued for travel in this case were enclosed in one or two booklets, or whether a second booklet was used because the ticketing agent did not have on hand a ticket booklet with more than

> two coupons, or whether the two booklets were stapled together. What should matter when determining whether two or more ticket booklets constitute a single contract for purposes of the Treaty are the time and place of issuance of the booklets and the contemplated degree of continuity of the journey being ticketed. We need not attempt to formulate a general test to fit all of the combinations of relevant facts that might arise. It suffices to agree with Judge Nickerson that a single contract existed on the undisputed facts of this case. Appellant makes no claim that Conrado intended to purchase only a ticket from Madrid to New York and was issued a return ticket by mistake.

756 F.2d at 265-66; App. 4a-5a. The conclusion of the Court below, based upon the undisputed facts as to the decedent's ticketing, was correct and does not warrant review by the Court.

II.

The Decision of the Court Below Is Consistent With Substantial Authority in Other Circuit and District Courts.

The conclusion reached by the Court of Appeals was in conformity with earlier precedents which have held that, for purposes of determining "the place of destination" within the meaning of Article 28(1) of the Warsaw Convention, the ultimate destination shown in the contract of transportation is controlling. *Gayda* v. *LOT Polish Airlines*, 702 F.2d 424 (2d Cir. 1983); *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971); *Butz* v. *British Airways*, 421 F. Supp. 127 (E.D. Pa. 1976), *aff'd*, 566 F.2d 1168 (3d Cir. 1977); *McCarthy* v. *East African Airways Corp.*, 13 Av. Cas. (CCH) 17,385 (S.D. N.Y. 1974), *aff'd sub nom. Fay* v. *East African Airways Corp.*, 517 F.2d 1395 (2d Cir. 1975). Numerous District

Court opinions have also adopted this interpretation of "the place of destination" within the meaning of Article 28(1). *See In Re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345, MDL No. 565 (D.D.C. July 25, 1985); *Karfunkel* v. *Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); *Camacho* v. *Aerovias Nacionales de Colombia, S.A.*, 18 Av. Cas. (CCH) 17,870 (S.D.N.Y. 1984); *Bornstein* v. *Scandinavian Airlines System*, 16 Av. Cas. (CCH) 17,741 (S.D.N.Y. 1981); *Fulton* v. *Lufthansa German Airlines*, 14 Av. Cas. (CCH) 18,284 (N.D.Ill. 1977).

The only cases disagreeing with this analysis of the meaning of the term "the place of destination" as it is used in Article 28(1) are District Court decisions from California which are legally incorrect and, if not, factually distinguishable. In *Aanestad* v. *Air Canada, Inc.*, 390 F. Supp. 1165 (C.D. Cal. 1975) where the date of the passenger's return flight was open, and in *Hurley* v. *KLM Royal Dutch Airlines*, 562 F. Supp. 260 (C.D. Cal. 1983), where the passenger was uncertain as to whether she would ever return to the place listed as the destination on the contract of transportation, the District Courts held that the destination of the flight on which the passenger was travelling at the time of the accident was "the place of destination" for Article 28 purposes. The *Hurley* decision was recently vacated for reasons unimportant here. *Hurley* v. *KLM Royal Dutch Airlines*, 602 F. Supp. 1249 (C.D. Cal. 1985).

In any event, the *Hurley* and *Aanestad* cases are factually distinguishable from the petitioner's case: all of the decedent's flight coupons here were filled in with the date and number of the flight, petitioner's decedent planned to remain in New York for only five days, and petitioner concedes that her decedent's stay in the United States was temporary (Petition, p. 4). Given these facts, the Court of Appeals properly approved the District Court's "sensible approach" in ruling that, at least in this case, where it

was undisputed that two sequentially numbered ticket booklets were issued at the same time and at the same place for a round trip to be interrupted by no more than a five day stopover, a single contract of transportation had been made.

This case does not present a substantial question of treaty interpretation requiring a decision by the Court. There is but one "place of destination" for Article 28(1) purposes regardless of the number of ticket booklets which make up the contract of transportation.

The Court below correctly held that there was a single contract of transportation with the place of destination in Madrid. Since the other places where an action for damages must be brought under Article 28(1) were concededly not in the United States, the Complaint was properly dismissed for lack of treaty jurisdiction.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

/s/ MICHAEL J. HOLLAND

MICHAEL J. HOLLAND
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1251 Avenue of the Americas
New York, New York 10020

CONDON & FORSYTH
Of Counsel

Certificate of Service

I hereby certify that I have, this 31st day of July, 1985, served three copies of the foregoing Brief in Opposition by respondent Spantax, S.A. to the Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit upon petitioner by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

FRANK H. GRANITO, JR.
SPEISER & KRAUSE, P.C.
200 Park Avenue
New York, New York 10166
Counsel for Petitioner

July 31, 1985

/s/ MICHAEL J. HOLLAND

MICHAEL J. HOLLAND
Counsel for Respondent
Spantax, S.A.

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT SPANTAX, S.A.

MICHAEL J. HOLLAND
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1251 Avenue of the Americas
New York, New York 10020

BEST AVAILABLE COPY

No. 85-91

IN THE

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OCTOBER TERM, 1985

MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT SPANTAX, S.A.

Respondent Spantax, S.A. submits this Supplemental Brief[1] for the purpose of bringing to the attention of the Court the decision of the United States Court of Appeals for the Second Circuit in *Al-Zamil* v. *British Airways Inc.*, Docket No. 85-7089 (2d Cir. August 2, 1985), a copy of which is printed in the Addendum to this Supplemental Brief. This decision was rendered after the filing of Respondent's Brief in Opposition and is further support for the proposition, accepted in numerous cases, that there is but one "place of destination" for Article 28(1) purposes regardless of the number of ticket booklets which make up the contract of transportation.

---

[1] U.S. Sup. Ct. Rule 22.6.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

/s/ MICHAEL J. HOLLAND

MICHAEL J. HOLLAND
Counsel for Respondent
Spantax, S.A.
1251 Avenue of the Americas
New York, New York 10020

CONDON & FORSYTH
Of Counsel

Certificate of Service

I hereby certify that I have, this 16th day of August, 1985, served three copies of the foregoing Supplemental Brief in Opposition by respondent Spantax, S.A. to the Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit upon petitioner by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid to:

FRANK H. GRANITO, JR.
SPEISER & KRAUSE, P.C.
200 Park Avenue
New York, New York 10166
Counsel for Petitioner

August 16, 1985

/s/ MICHAEL J. HOLLAND

MICHAEL J. HOLLAND
Counsel for Respondent
Spantax, S.A.

ADDENDUM

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1092—August Term, 1984

(Argued April 15, 1985 Decided August 2, 1985)

Docket No. 85-7089

IN RE: ALLEGED FOOD POISONING INCIDENT, MARCH, 1984

ABDULRAHMAN AL-ZAMIL,

Plaintiff-Appellant,

—v.—

BRITISH AIRWAYS INC.,

Defendant-Appellee.

BEFORE:

OAKES, MESKILL and PIERCE,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Knapp, *Judge*) which dismissed plaintiff's complaint, holding that under the Warsaw Convention the court had no treaty jurisdiction over plaintiff's claim.

Affirmed.

MICHAEL B. TRISTER, Washington, D.C. (Abourezk, Sobol & Trister, Washington, D.C., of counsel) *for the Plaintiff-Appellant.*

LAWRENCE MENTZ, New York, New York (Wendy A. Grossman, John F. Shutty III, Condon & Forsyth, New York, N.Y., of counsel) *for the Defendant-Appellee.*

PIERCE, *Circuit Judge:*

This appeal, from an order of the United States District Court for the Southern District of New York (KNAPP, *Judge*) which dismissed plaintiff's complaint on the ground that there existed no treaty jurisdiction, raises the question whether, under the Warsaw Convention ("Convention"),[1] an undivided transportation may for jurisdictional purposes have more than one "destination" if more than one carrier, or successive carriers, are parties to the contract of transportation. We hold that when the parties have contemplated a single operation of undivided transportation only one "destination" exists, and, in the case of a round trip, that destination is the same as the place of origin. The plaintiff concedes that jurisdiction was proper in the United States only if the United States was his place of "destination" within the meaning of the Convention; we find no error in the district court's conclusion that it was not, and therefore affirm the district court's order dismissing the complaint for want of jurisdiction.

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929 (Warsaw Convention), 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. § 1502 note.

BACKGROUND

Plaintiff's complaint alleged that on March 13, 1984, Al-Zamil, the Deputy Minister of Commerce for Saudi Arabia, contracted serious food poisoning while on board British Airways, Concorde Flight 189, en route from London to Washington, D.C. This flight was an intermediate leg of a round trip originating and terminating in Riyadh, Saudi Arabia, with stops in Dharhan, Saudi Arabia; London; Washington, D.C.; and New York City. All of the flights were ticketed in a total of two booklets, known as a "conjunction ticket"—the first booklet covered all stops from Riyadh to New York, and the second covered the return flight from New York directly to Riyadh. The only part of Al-Zamil's transportation provided by British Airways was the Concorde flight from London to Washington. The conjunction ticket was issued in Saudi Arabia, and the fare for the entire journey was paid in Saudi currency at the time the ticket was issued. Both booklets list Riyadh as the origin and destination of the journey.

Al-Zamil alleged that after contracting food poisoning, he received medical care in the United States. Thereafter, on May 11, 1984, he filed the complaint herein, in the United States District Court for the District of Columbia, claiming both negligence and willful misconduct and seeking damages. The action was transferred by the Judicial Panel on Multi-District Litigation to the Southern District of New York, and was consolidated for pretrial purposes with the actions of other passengers relating to the same food poisoning incident. On January 7, 1985, the district judge in a memorandum decision granted the motion of British Airways and ordered Al-Zamil's complaint dismissed for lack of treaty jurisdiction. For the reasons hereinbelow stated, we affirm the district court's order.

DISCUSSION

Al-Zamil concedes that jurisdiction over his claim can be had in a United States court only if the United States was the "place of destination" of his journey, within the meaning of Article 28(1) of the Convention.[2] He claims that because British Airways was involved in his trip only to the extent of transporting him from London to Washington, D.C., his "destination" was Washington, that is, the United States, for the purpose of determining treaty jurisdiction over this action. We disagree.

First, the "destination" of a journey for Convention purposes is determined by reference to the intent of the parties. "Plainly, when different carriers are involved, the pertinent unit of travel for determining the 'destination' is the 'single operation' of 'undivided transportation' as 'regarded by the parties.'" *Petrire* v. *Spantax, S.A.*, 756 F.2d 263, 266 (2d Cir. 1985) (quoting Warsaw Convention, Article 1(3)); *see In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980,* 748 F.2d 94, 96-97 (2d Cir. 1984). In other words, if the parties have regarded the

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[2] Article 28(1) provides:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

We note that there are two levels of judicial power pertinent to the determination whether suit may be maintained in the United States: the first involves jurisdiction in the international or treaty sense, under Article 28; the second relates to the power of a federal court, under federal statutes and practice, to hear a Warsaw Convention suit. Both levels must exist for suit to be maintained. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798 (2d Cir. 1971). Because we hold that the first level herein is not satisfied, no analysis of the second level is necessary.

transportation as a single, undivided operation, the beginning of that operation is the origin and the end of the operation is the destination. *See Gayda* v. *LOT Polish Airlines,* 702 F.2d 424, 425 (2d Cir. 1983); *In re Air Crash Disaster at Malaga, Spain on September 13, 1982,* 577 F. Supp. 1013, 1014 (E.D.N.Y. 1984), *aff'd sub nom. Petrire* v. *Spantax, S.A.,* 756 F.2d 263 (2d Cir. 1985); *Butz* v. *British Airways,* 421 F. Supp. 127, 130-31 (E.D. Pa. 1976), *aff'd mem.,* 566 F.2d 1168 (3d Cir. 1977).

That a single, undivided transportation has only one beginning and one end would seem logically clear. This interpretation is supported by the Convention, which in Article 1(2) uses the term "destination" in the singular, implying that there is only one "destination" for an undivided transportation. Article 1(2) also draws a distinction between a "destination" and an "agreed stopping place." It is the "destination," and not an "agreed stopping place," that controls for purposes of treaty jurisdiction under the Convention. *Gayda,* 702 F.2d at 425; *Bornstein* v. *Scandinavian Airlines System,* 16 Av. Cas. (CCH) 17,741 (S.D.N.Y. 1981); *Butz,* 421 F. Supp. at 130-31; *Vergara* v. *Aeroflot "Soviet Airlines",* 390 F. Supp. 1266 (D. Neb. 1975); *Rinck* v. *Deutsche Lufthansa A.G.,* 57 A.D.2d 370, 395 N.Y.S.2d 7 (1977), *aff'd mem.,* 44 N.Y.2d 714, 405 N.Y.S. 2d 456, 376 N.E.2d 929 (1978); *Bowen* v. *Port of New York Authority,* 8 Av. Cas. (CCH) 18,043 (N.Y. Sup. Ct. 1964).

Herein, Al-Zamil purchased one ticket, in two booklets, for a round-trip journey. The booklets clearly listed Riyadh as both the origin and destination of the voyage. It seems clear to us, as it was to the district court, that the ultimate destination of this journey was Riyadh, and not any point within the United States. The stops in the United States were no more than "agreed stopping places." *See Gayda,* 702 F.2d at 425; *Butz,* 421 F. Supp. at 130-31.

Indeed, Al-Zamil does not dispute that the *ultimate* destination of his journey was Riyadh, or that a single operation of undivided transportation was contemplated herein. He argues, however, that if successive carriers are involved in a journey, jurisdiction under the Convention is determined by the destination according to the contract of *each* successive carrier with the passenger. We disagree. Al-Zamil relies upon *In re Air Crash Disaster at Warsaw, Poland, on March 14, 1980,* 748 F.2d 94 (2d Cir. 1984). *Warsaw,* however, held only that, on its facts, the parties had not regarded the voyage as a "single operation" of "undivided transportation." *Id.* at 96-97. Al-Zamil's reliance upon Article 30(1) of the Convention[3] is also misplaced. *Warsaw* held that pursuant to Article 30(1), each carrier on a journey involving successive carriers may have contractual obligations that must be individually discharged; specifically, that one carrier does not escape its obligation under the Convention to deliver an appropriate ticket simply because the other carriers have discharged their similar obligations. *Id.* at 97. In this case, merely because British Airways was not contractually obligated to deliver Al-Zamil to his ultimate destination does not mean that it, and Al-Zamil, are not subject to the jurisdictional provisions of the Convention.

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[3] Article 30(1) provides:

> In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

Similarly, we reject Al-Zamil's argument that Article 1(3),[4] defining the circumstances under which a journey is to be considered a "single operation" of "undivided transportation," does not apply to questions of jurisdiction under the Convention. Article 1(3) unequivocally applies "for purposes of this Convention." In our view, this language amply encompasses the jurisdictional provisions of the Convention, and we believe that Article 1(3) does indeed apply to jurisdictional, as well as other, Convention provisions. *See Petrire,* 756 F.2d at 266.

Al-Zamil next claims that to hold British Airways not to be amenable to suit in the United States in this case would run counter to the policy of Article 28, which, he asserts, evidences a general intent to limit the places in which a carrier may be sued. We do not consider our holding today to be contrary to the intent underlying Article 28. Instead, we read the language of Article 28 and Article 1(3) in conjunction, and hold that they clearly indicate that a journey has but one "destination" for purposes of jurisdiction under the Convention. We agree with the district judge that the destination herein was Riyadh, not the United States.

We have considered appellant's remaining claims and find them to be without merit. We hold that in cases of

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[4] Article 1(3) provides:

> Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

roundtrip carriage involving successive carriers, where the parties contemplated a single operation of undivided transportation, the "destination" of the journey is the ultimate destination, that is, the place from which the journey originated. Accordingly, we affirm the judgment of the district court.